IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

COPY

No. 33339

THE ESTATE OF HARTFORD E. BEALER, BY U.S. TRUST COMPANY OF FLORIDA, S.B., As Executor of the Estate of Hartford E. Bealer and U.S. TRUST COMPANY OF FLORIDA, S.B., as Trustee of the Hartford E. Bealer Amended and Restated Declaration of Trust, SALLY KIRCHIRO, Trustee, and KATHLEEN STONE,

Appellants / Defendants Below,

v.

NANCY B. PARKER, TRUSTEE OF THE HARTFORD E. BEALER FOUNDATION,

Appellee / Plaintiff Below.

APPELLANTS' BRIEF ON APPEAL

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I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

This case is about the legal struggle between Nancy Parker and Sally Kirchiro, the two daughters of a man named Hartford Bealer, over Bealer's extensive estate, which includes ownership of Bealer's 277.42 acre riverfront Hampshire County Farm.[1] Bealer is now deceased. Bealer's estate[2] is in probate in Florida, and the West Virginia Farm is only one part of the estate litigation that Nancy Parker has instituted in Florida and Maryland.

Nancy Parker was unhappy with the distribution of her father's large estate. She challenged his estate plan, pre-death transfers, and property distribution in Florida, Maryland, and here in West Virginia.

A primary question before the Circuit Court was whether to follow Bealer's testamentary intent (evident in Bealer's Florida estate documents) and allow the Farm to remain in Bealer's estate (like Bealer wanted) or whether to disregard Bealer's intent, remove the Farm from the estate, and return it into a charitable Foundation that Bealer had created and then *de facto* terminated before his death[3] - a Foundation which Nancy Parker now controls. The Circuit Court of Hampshire County, Honorable Judge Andrew Frye, granted summary judgment in Plaintiff/Appellee Nancy Parker's favor and, as a result, ordered[4] the Farm to be removed from the estate and deeded to the charitable

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[1] The Farm has a 2003 appraised value of over 1.2 million dollars.

[2] Bealer's gross estate was reported for Federal Estate Tax purposes at $22,342,055 (*See* the Petition for Instruction filed with the Florida Probate Court and attached as *Exhibit A* to Petition for Appeal filed on November 30, 2006, which details the estate and the other litigation in this estate)

[3] The title of the Foundation is the Hartford E. Bealer Foundation and is referred to as the "Foundation" herein.

[4] The Circuit Court issued its final order in this case on August 16, 2006. The Court previously

Foundation, under Nancy Parker's control.

Bealer, a Florida resident, who was a very successful businessman with numerous property holdings in the Washington, D.C. area, had before his death taken steps to create the tax-exempt charitable Foundation, into which he placed the title of his Hampshire County Farm. The Foundation was part of his overall estate plan. The same year he took steps to create the Foundation, and without taking any tax benefit from the Foundation, Bealer came to believe that he had made a mistake in putting the Farm into the Foundation – a mistake based on information he received from Nancy Parker's husband, Attorney Jay Parker. This mistake, Bealer believed, would require him or the Foundation to sell his Farm to meet the IRS five percent distribution rule [5] - exactly the opposite of Bealer's goal of preserving the Farm.

Based on his belief that he made a mistake, Bealer took the Farm back out of the Foundation. He then put the farm in a pour over trust as part of his Florida estate plan to be given to his granddaughter, who had numerous historical and emotional ties to the

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refused the Defendant's request to enter into an early appeal under W.Va. R. Civ. P. 54(b). *See* the record of the case below including the June 2, 2006 Order Granting Plaintiff's Motion for Summary Judgment, and Orders of August 16, 2006 Refusing Defendants' Motion for Stay, Granting Plaintiff's Motion to Execute Deed and Granting Plaintiff's Motion for Removal of Successor Trustee, Sally B. Kirchiro of the Hartford E. Bealer Foundation.

[5] After creating the charitable Foundation in Florida in April of 2000, Bealer placed his Farm into the Foundation without consideration after being assured by Attorney Ellis J. Parker (who is Bealer's son-in-law, and Nancy Parker's husband) that the Foundation would not have to comply with the IRS five percent rule, which Bealer believed would require five percent of the Foundation's assets to be distributed to another charitable organization each year. After the Farm was placed into the Foundation in May of 2000, Bealer came to believe that Jay Parker was wrong, and that his Farm would have to be progressively sold to meet the five percent rule. After assuring Bealer that he could avoid the five percent rule, Jay Parker did not communicate his supposed plan to avoid the five percent rule with Bealer at any time during the 2000 calendar year after the initial set up of the Foundation in April of 2000. On December 11, 2000, in Florida, after several attempts were made to reach Parker regarding the five percent distribution requirement, Bealer signed a deed removing his Farm from the Foundation and deeding it back to himself after realizing, based on his perceived mistake, the unwanted tax consequences under the five percent rule if he left his Farm in the Foundation. Ultimately, Bealer left the Farm to his granddaughter in his estate, (Defendant Kathleen Stone) since she shared his goal of preserving the Farm for future generations.

Farm. Bealer recognized that his granddaughter loved the Farm and wanted her to have it because he did not want the Farm sold.

The Circuit Court disregarded Bealer's obvious intent to nullify the Foundation and preserve his Farm, which was evidenced by Bealer removing the Farm from the Foundation (which he saw as a vehicle for estate planning) and then placing the farm in his pour over trust as part of his estate plan. The Circuit Court summarily ruled that Bealer could not take the Farm out of the Foundation and ordered to Farm deeded back into the Foundation under Nancy Parker's control.

The Circuit Court ignored the evidence of Bealer's mistake in relying on his son-in-law, Jay Parker's advice that the five percent distribution rule could be avoided. The Circuit Court made its decision without applying Florida law that indicates that trust documents created by mistake are void.[6] The Circuit Court disregarded the jurisdictional facts that all relevant actions in this case took place in Florida, all relevant documents were signed in Florida, and Bealer's estate is in probate in Florida. The Circuit Court disregarded the estate's jurisdictional challenges, and ignored the opinion of a Board Certified, Wills, Trusts and Estate lawyer in the State of Florida, that the Foundation was in itself a nullity.

As a result of the Court's decision in this case, the Appellants / Defendants below, U. S. Trust Company of Florida, as Executor of the Estate of Hartford E. Bealer, and as

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[6] The Circuit Court acknowledged Florida law but does not really apply it as to the legal doctrine of mistake. Florida law applies to this case, both because the Foundation documents were created and executed in Florida, and because the Foundation document contains an undisputed choice of law provision. Under Florida law a trust is void if the execution is procured by mistake. Mistake is not defined by the statute, however, and, since no case has directly construed this law regarding Foundations, Defendants requested that the Circuit Court apply the normal meaning of mistake under the rules of statutory construction. Under that interpretation, Bealer's mistake made the Foundation void *ab initio*. Also, since there was no consideration given for the transfer, there is no contractual obligation to keep the Farm in the Foundation.

Trustee of the Hartford E. Bealer Amended and Restated Declaration of Trust, ("Estate" herein)[7] by counsel, Richard G. Gay, Nathan P. Cochran, of the Law Office of Richard G. Gay, LC, and Alan Riley, Attorney at Law, now file this Joint Brief on Appeal pursuant to Rule 10 of the W.Va. R.A.P.

The Estate therefore respectfully requests that this Court reverse the actions of the Circuit Court and order the Farm placed back into Bealer's Florida Estate.

II. STATEMENT OF RELEVANT FACTS

1. Hartford E. Bealer was a very successful Maryland businessman who came to Florida in 2000 and became a Florida resident.

2. In April of 2000, Bealer met with his attorneys, Ronald Fick and Jonna Brown,[8] in Florida to discuss his estate planning.[9] Bealer established a variety of estate planning documents, all of which were drafted and signed in Florida.

3. Bealer also requested that Fick create a charitable Foundation and qualify the Foundation as a 501(c)(3) organization with the IRS. Bealer desired to transfer his Farm located in Hampshire County, West Virginia (herein "Farm" or "Millrace Farm") to the Foundation to preserve the Farm in its present state, and to protect it from

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[7] The Bealer estate is actually a separate party from Sally Kirchiro, (who is one of Bealer's two daughters and Kathleen Stone (who is the daughter of Sally Kirchiro)) however, the parties have joined in this Brief on Appeal, and, for the Court's convenience in this Brief, are collectively referred to as the "Estate."

[8] Fick and Brown are members of the Florida firm of Dunwody White & Landon, P.A., which has offices in Miami (Coral Gables), Naples, Palm Beach and Hobe Sound, Florida. Their practice is mostly connected with trust and estate law. Fick is a Board Certified Wills, Trusts and Estate Lawyer in the State of Florida, and has been certified since 1988. To become Board certified, an attorney must take an examination, have a substantial involvement in the practice area, obtain recommendations from several peers, and have (for re-certification) 125 CLE credits in a five year period.

[9] *See* Depo. Ronald L. Fick (April 19, 2005) 81:22-82:5; *see* Depo. Jonna S. Brown (April 20, 2005) 17:17-18; 18:5-6.

further development.[10]

4. Ronald Fick, Bealer's Florida attorney, testified that:

> "Mr. Bealer said he did not want this farm sold. He wanted it preserved. He wanted it conserved. He wanted it in the form it's in now or was then. He wanted it to be available for children to come and enjoy the farm, inner-city children, to see what farm life was like. He wanted all his exotic animals to stay there. He didn't want it touched."[11]

5. A Charitable Foundation, such as Bealer created in this case, has no special or magical properties of its own, but is merely a creature born because of the Federal tax laws, with specific rules that must be followed to obtain an income tax benefit.[12] If one wants the income tax benefit, one must follow the Foundation rules; if one does not follow the rules, no tax benefits are realized.

6. One federal tax law associated with a Foundation is that a minimum of five percent of the market value of the Foundation's assets must be distributed annually to one or more charitable organizations.

7. Fick and Brown had concerns that the Foundation was not the correct vehicle to accomplish Bealer's goals, but Bealer told them that his son in law, (the Plaintiff's husband, Jay Parker, who is an attorney), assured Bealer that Jay "had a way around the five percent distribution rule."[13] Ronald Fick testified that Bealer told him:

> ". . . his son-in-law, Jay Parker, is a tax lawyer, and that Jay Parker had already worked this out with the Cincinnati office of the Internal Revenue Service and with the State of West Virginia, and that this Foundation would not be subject to the same five percent rule that normal charitable Foundations are."[14]

8. Jonna Brown also advised Hartford Bealer that there were only two ways the

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[10] *See* Depo. Jonna S. Brown (April 20, 2005) 21:6-22:2.
[11] *See* Depo. Ronald L. Fick (April 19, 2005) 50:6-14.
[12] *See* I.R.C. §501(c)(3) .
[13] *See* Depo. Ronald L. Fick (April 19, 2005) 43:23-25.
[14] *See* Depo. Ronald L. Fick (April 19, 205) 42:22-43:3.

five percent minimum distribution requirement could be satisfied; contribute additional money each year or to sell a portion of the Farm.[15]

9. Nonetheless, based on Jay Parker's assurances, Hartford Bealer expressed his desire to proceed with the Foundation and deeded the Farm to the Foundation.[16] In response to the concerns brought to his attention, Jonna Brown has testified that Hartford Bealer stated:

> "I understand what you're saying, but Jay Parker has been working with the Internal Revenue Service and the State of West Virginia. This is his baby, and I'm going to let him run with it."[17]

10. Ronald Fick similarly testified, stating:

> "He said that Jay had already worked this out. He thanked us for the research, but he said that this is Jay's baby, and that was actual words he used, 'This is Jay's baby. Let's let him run with it.'"[18]

11. Ronald Fick testified that Jay Parker telephoned him two or three times prior to the execution of the Foundation documents. During one of those calls, Ronald Fick inquired specifically about the five percent minimum distribution rule. Jay Parker told Ronald Fick that "he was taking care of that, not to worry."[19] Ronald Fick also testified that Jay Parker told members of the Firm that "he had things worked out with the Internal Revenue Service and the State of West Virginia."[20]

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[15] *See* Depo. Jonna S. Brown (April 20, 2005) 114:20-25; *See* Depo. Ronald L. Fick (April 19, 2005) 48:4-24.
[16] *See* Depo. Jonna S. Brown (April 20, 2005) 79:11-20.
[17] *See* Depo. Jonna S. Brown (April 20, 2005) 68:18-25.
[18] *See* Depo. Ronald L. Fick (April 19, 2005) 45:13-18; 214:8-14.
[19] *See* Depo. Ronald L. Fick (April 19, 2005) 75:1-17.
[20] *See* Depo. Ronald L. Fick (April 19, 2005) 77:14-20. In contrast, to the attorney's testimony and Bealer's representations to them, Jay Parker has testified that he never spoke to Hartford Bealer about the five percent minimum distribution requirement. *See* Depo. Ellis J. Parker (January 6, 2005) 58:8-12. Parker knew about the five percent requirement because on September 13, 2000, Fick received a letter from Jay Parker stating in part, "The Foundation was approved in record time with the aid of the Cincinnati office of the IRS and the support of the West Virginia Wild Life 'people.'" The letter further stated, "We are aware of the requirements of

12. On April 27, 2000, Hartford E. Bealer, acting as Settlor, established the "Hartford E. Bealer Charitable Foundation."[21] Mr. Bealer named himself and Jay Parker, the husband of the Plaintiff and the attorney who advised him that the five percent minimum distribution rule would not be an issue, as co-trustees of the Foundation.

13. Mr. Bealer specifically retained the power to terminate the Foundation, [22] remove any Trustee,[23] and name additional or successor Trustees.[24] This paragraph states in part, "The trust shall continue forever unless the Trustee terminates it and distributes all of the principal and income, which action may be taken by the Trustee in the exercise of discretion at any time."

14. In May of 2000, Hartford E. Bealer, transferred[25] the Farm at issue in this case to the Foundation without consideration.[26]

15. No other significant assets were transferred into the Foundation by Mr. Bealer at that time or at any other time prior to his death.

16. Jay Parker then failed to communicate with Mr. Bealer Bealer's attorney, Ronald Fick, testified that Jay Parker "went dark" and Bealer became fearful that Parker

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Section 4942 as well as other provisions of the Code affecting us and will now 'run with the ball you threw us.'" Further, Parker had apparently been involved in discussions about these issues for some time, including meeting the five percent rule. *See* affidavits of Nancy Ailes and George Constantz attached as *Exhibits P* and *Q* to Defendants' Memorandum of Law in Opposition to Plaintiff's Summary Judgment Motion filed on May 12, 2006 as contained in the record below.

[21] See copy of the Foundation document attached as *Exhibit R* to Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment filed on May 12, 2006 as contained in the record below.

[22] Foundation document paragraph 1.4

[23] Foundation document paragraph 3.2.2

[24] Foundation document paragraph 3.3.1

[25] *See* deed attached as *Exhibit S* to Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment filed on May 12, 2006 as contained in the record below.

[26] The deed does not reflect actual consideration, other than the route "ten dollars."

would sell his Farm. Fick testified:

> Throughout November he wanted to know - - he had not heard, and he had tried to reach Mr. Parker, as well, and couldn't reach him. Our firm was not able to reach him.
>
> He was concerned that Mr. Parker was going to sell some of - - some portion of his farm in West Virginia, and he was concerned about it. and when Jay Parker went dark, we couldn't reach him and he couldn't reach him, that is, Mr. Bealer couldn't reach him, he asked, "What can I do?"
>
> And we told him, "Well, you can remove Jay Parker as a Trustee." And I believe that was in early November. It may have been at that November 8th meeting.

Fick Depo. (April 19, 2005) 158:22-159:10.

17. Jonna Brown, Bealer's Florida attorney, also testified that Bealer came to fear that Jay Parker might sell the Farm

> A. I remember in November of 2000, when we had not received a response from Mr. Parker to this letter, Mr. Bealer was very concerned about the sale of the real - -of the real estate in the Foundation.
>
> Q. He told you because he did not hear back a response to this letter of October - - you letter of October 18th, 2000, that he was concerned?
>
> A. Yes, he was concerned and we - - was - - well, yeah, he was concerned that Jay was going to sell this property without Mr. Bealer knowing anything about the sale and the fact that the property was being sold. He didn't want the property being sold. He was very concerned about it.[27]

Brown also testified that Jay Parker had not communicated with Bealer, and that Bealer "heard rumors that Mr. Parker was negotiating a sale of the property."

18. Later that year, after learning that Jay Parker was wrong and that the five percent minimum distribution rule could not be avoided, Bealer removed[28] Jay Parker as co-trustee of the Foundation, and did not appoint a replacement, leaving himself as

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[27] *See* Depo. Jonna Brown, (April 20, 2005) 167:4-16.

[28] *See* removal dated November 30, 2000, attached as *Exhibit T* to Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment filed on May 12, 2006 as contained in the record below.

the sole trustee of the Foundation.

19. After Bealer learned that the five percent minimum distribution rule could not be avoided, he was left with three options: 1) contribute money into the Foundation to cover the five percent minimum distribution rule estimated at $50,000 annually,[29] 2) sell a portion of Farm, or 3) transfer the Millrace Farm property out of the Foundation prior to December 31, 2000.

20. On December 11, 2000, Bealer, acting as the sole remaining trustee for the Foundation, transferred[30] the Farm back to himself, leaving no other significant assets in the Foundation. Bealer claimed no income tax benefits resulting from his transfer of the Farm to the Foundation because he removed the Farm from the Foundation before year-end because the Foundation did not accomplish its intended purpose.

21. Bealer later revised his estate plan to provide that the Farm would be distributed upon his death to his granddaughter, Kathleen Stone, since she loved the Farm like he did. Kathleen Stone has testified[31] that:

> He was thrilled that I loved the farm. He was concerned that it was such a money drain and such an effort drain. For anyone in the family to be able to preserve this would be a dream for him; that I was interested in possibly filling that bill delighted him and that I loved every grain of soil in that Farm pleased him. He struggled over whether he thought that - - that that

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[29] If Bealer had contributed a substantial amount to fund the five percent minimum distribution going forward, that amount would have increased the annual required minimum distribution (e.g., a contribution of $100,000 would mean that in the first year the minimum distribution would have been increased by $5,000 – 5% of $100,000). Further, Jay Parker had known for some time that Bealer would or could not fund an endowment for the Foundation, since Parker had held conversations with persons in charge of conservation groups that would have taken the Farm if Bealer gave an endowment, which Bealer refused. *See* affidavits of Nancy Ailes and George Constantz attached as *Exhibits P* and *Q* to Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment filed on May 12, 2006 as contained in the record below.

[30] *See* deed attached as *Exhibit U* to Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment filed on May 12, 2006 as contained in the record below.

[31] *See* Depo. Kathleen Stone (December 3, 2004) 18:10-20.

would be good. He was thrilled that I - - he saw me loving the farm.

22. On or about January 9, 2003, Hartford E. Bealer passed away at the age of 93, leaving the Farm to his granddaughter, Kathleen Stone, in his estate plan.

23. Bealer's estate plan is fairly complex, but the key provision regarding the Farm is contained in the Fourth Amended and Restated Declaration of Trust, where Bealer leaves the Farm to his granddaughter, Kathleen Stone, and reduces her cash gifts under his estate. The Fourth Amended and Restated Declaration of Trust states:

> 3.7 Distribution of Real Property to Kathleen H. Stone. The Trustee shall distribute all right, title and interest owned by the Trustee (or distributable to the Trustee by reason of my death) in the real property known as the Millrace Farm, located in Hampshire County, West Virginia, including the two residences located thereon and all animals located thereon, including, but not limited to, cattle, buffalo, llamas, donkeys, horses and goats, to my granddaughter, KATHLEEN H. STONE, if she survives me. If my said granddaughter does not survive me, then such real property, including such residences and animals, shall be distributed per stirpes to the descendants of my granddaughter, KATHLEEN H. STONE, who survive me, or if none, then this distribution shall lapse; except that any portion otherwise distributable to a great grandchild of mine shall be further held in trust for the benefit of such great grandchild and administered as provided in Article V below. This distribution shall be free of any estate, inheritance or GST taxes assessed by reason of my death.

24. On July 27, 2004, Howard R. Johns qualified as the Ancillary Administrator of the Estate of Hartford E. Bealer by the Clerk the County Commission of Hampshire County, West Virginia.[32]

25. Ronald Fick, Bealer's estate planning attorney, who is a Board Certified, Wills, Trusts and Estate Lawyer in the State of Florida, has testified that the Foundation was always void:

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[32] *See* Qualification of Howard Johns attached hereto as *Exhibit B* to Petitioner's Petition for Appeal.

". . . under Florida law if a Trust, the execution of which is procured by a mistake - - and in this case we had a mistake because Mr. Bealer was under the mistaken impression that by putting his farm into the Foundation, that was all he was going to have to put in, nothing else, and would never have to sell any of the farm, that the Trust was void. Under Florida law if the execution of a Trust is procured by a mistake, it's void."[33]

26. Jonna Brown, who, along with Fick, was also Bealer's estate planning attorney, likewise testified that she believed the Foundation was never valid:

"I believe that the Hartford E. Bealer Foundation was never a valid Foundation." Q. "On what do you base that opinion?" A. "Based upon my knowledge of what Mr. Bealer's understanding was of the Foundation." Q. "Anything else?" A. "Based upon that this Foundation was - - the Foundation document was so inconsistent with Mr. Bealer's purposes, that it was never valid."[34]

27. After Bealer transferred the Farm out of the Foundation, Bealer continued to pay all expenses related to the Farm (real estate taxes, insurance, repairs and the like) for the remainder of his life as he had in the past.

28. Ronald Fick testified:

". . . by transferring the property in and out in the same year would not create a problem with the Internal Revenue Service . . . , and particularly where Mr. Bealer's intent was really thwarted in that he never intended to put any additional property in. He never wanted any part of the farm sold, and it was crystal clear that he was going to have to do one of those two things. He didn't want to do either, and so given the fact that the property was transferred in and out in the same year there was no tax benefit to Mr. Bealer, no tax benefit to the Foundation, no deductions taken by Mr. Bealer on any tax return, basically no harm, no foul."[35]

29. During Bealer's lifetime, Plaintiff did not challenge Bealer's transfer of the Farm out of the Foundation.

30. Five years after the creation of the Foundation, the Internal Revenue Service has not assessed any penalties in connection with Bealer's transfer of the Farm out of

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[33] See Depo. Ronald L. Fick (April 19, 2005) 60:10-18.
[34] *See* Depo. Jonna S. Brown (April 20, 2005) 109:12-20.
[35] *See* Depo. Ronald L. Fick (April 19, 2005) 58:8-21.

the Foundation.

31. Despite Bealer's clear desire to take his Farm out of the Foundation, Nancy Parker is challenging her father's right to do so. However, Plaintiff waited for her father's death to challenge his right to take the Farm back and to challenge many other of her father's actions.

32. On June 2, 2006, the Circuit Court entered an Order Granting Summary Judgment in favor of the Plaintiff Nancy Parker and against the Defendant Estate and ordered the Farm to be put back into the Foundation.

33. On July 10, 2006, the Circuit Court denied the Estate's motion to allow an interlocutory appeal of the summary judgment decision pursuant to W.Va. R. Civ. P. 54(b).

34. On August 16, 2006, the Circuit Court ordered the Farm deeded back to the Foundation, Sally Kirchiro removed as Trustee, and denied the Defendant's Motion for Stay pending appeal, and issued the final Order in the case, thus leaving Nancy Parker in control of the Foundation that controls the West Virginia Farm.

III. ASSIGNMENTS OF ERROR

A. The Foundation was Void *ab initio* Under Florida Law because of Bealer's Mistake

1. The Foundation was void under Florida law
2. The Court did not consider Florida Law that Provides that a Court Can Modify or Terminate a Trust Based on Circumstances
3. Bealer never received the tax benefits that are the legal basis for the Foundation
4. The Foundation was never adequately funded
5. There was no self dealing here
6. Under Florida law, Bealer Had A Right To Dispose Of His Own Property As He Saw Fit

B. Even if the Foundation was not Void *ab initio*, the Court below erred in its

failure to give effect to Mr. Bealer's intent to revoke the Foundation and give his Farm to his granddaughter Under his Estate plan

1. Bealer's intent was clear
2. The Foundation was part of Bealer's estate plan and the Court should apply the same standard of review to the Foundation that it would in construing a will

C. The Court below had no jurisdiction to alter Bealer's Florida estate plan

D. The Court's failure to join the West Virginia ancillary administrator deprived the Court of jurisdiction, consequently, the Court's judgment in the necessary party's absence is void

E. The Court below set aside the deed but did not engage in the analysis required under West Virginia law

F. The Court below granted summary judgment in the face of disputed facts, and did not fairly hear the evidence in the case

G. The Court below erred in failing to recognize that returning the Farm to the Foundation will likely result in devastating tax consequences

H. The Court below erred in failing to consider that there is no contractual obligation for the Farm to remain in the Foundation because no consideration existed for the transfer of the property to the Foundation

IV. POINTS AND AUTHORITES AND BASIS FOR THE APPEAL

A. The Foundation was Void *ab initio* Under Florida Law because of Bealer's Mistake

There was no effective Foundation created in this case because (1) the mistake in creating the Foundation makes the Foundation void under Florida law, and (2) Bealer never got the tax benefits to which he would have been entitled had the Farm remained in the Foundation.

The Circuit Court explicitly states that Florida law applies in this case (Order at 4)

but then fails to apply the crucial portions of Florida law that are directly relevant to the underlying documents in this case.

1. The Foundation was void under Florida law

The Foundation was void *ab initio* under Florida law.[36] Bealer was mistaken in his understanding of the five percent minimum distribution rule, and what the rule would mean to the Farm's future, when he created the Foundation. Bealer believed, (because of Jay Parker's advice) that the five percent minimum distribution rule did not apply to this Foundation.

Section 737.206 of the Florida Statutes states: "A trust is void if the execution is procured by fraud, duress, mistake, or undue influence. Any part of the trust is void if so procured, but the remainder of the trust not so procured is valid if it is not invalid for other reasons."

Since the term "mistake" is not defined[37] in the statute, [38] and no case has directly

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[36] Florida law applies to this case because all relevant estate planning and Foundation documents were prepared and signed in Florida. Bealer was a Florida resident, and all relevant actions took place in Florida. It is for this reason that Defendants filed a Suggestion of Lack of Jurisdiction with the Circuit Court and requested that the Circuit Court find that it lacked jurisdiction over this case. Further, the Foundation document itself contains a provision that makes the law of Florida the "governing law" in interpreting the "validity" of the document. See Foundation document Sec. 2.6.

[37] This statute became effective in 1993. (There was a 2000 amendment regarding additional language in this statute that is beyond the scope of this case). The term "mistake" is not defined in the statute. Since 1993, only three cases have referred to this statute, none of which construe the term "mistake."

[38] While no case since 1993 construes this statute regarding the meaning of "mistake" there are a variety of older cases involving wills that seem to indicate that mistakes in inducement are insufficient to invalidate wills, but they are inapplicable, for two reasons. *First*, those cases construe wills, not charitable Foundations created under Federal law. *Second*, in those cases, (including *Forsythe v. Spielberger*, 86 So.2d 427 (1956)), the courts are attempting to determine a testator's intentions and whether a mistake made by a testator in his or her will should be considered. In this case, there is no doubt as to Bealer's intentions with regard to the Farm, since he removed the Farm from the Foundation before his death. It may be reasonable for the Court to refuse to postulate on possible mistakes in inducement in a will after the testator's death, when the testator's intentions are not certain. It is quite another thing in this case,

construed this law regarding the definition of mistake with regard to Foundations, the Court should have applied the plain and ordinary meaning of mistake under the rules of statutory construction.[39]

Florida Courts look to a dictionary if the Court determines that a word needs to be defined beyond normal usage[40]: Mistake is defined in the dictionary as "misunderstanding the meaning or implication of something."[41]

Under that definition, Bealer made a "mistake" because he "misunderstood the meaning or implication" of whether the five percent minimum distribution rule applied to the Foundation – and, under the statute, his mistake made the Foundation void *ab initio*. This means that the Farm was never effectively transferred into the void Foundation. Bealer was therefore under no prohibition that would prevent him from removing the Farm from the Foundation, since the transfer to the Foundation was always void. As stated in the above facts, Bealer's Florida counsel, (one of whom is a

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because we are certain of Bealer's intentions, and he acted on those intentions before he died. The *Forsythe* cases simply do not apply here.

[39] Florida applies rules of statutory construction similar to those of West Virginia. In *Knowles v. Beverly Enterprises-Florida, Inc.*, 898 So.2d 1, (Fla.,2004), the Court said:

> "[T]he legislature is assumed to have expressed its intent through the words found in a statute." *Zuckerman v. Alter*, 615 So.2d 661, 663 (Fla.1993. Thus, "[i]f the language of a statute is clear and unambiguous, the legislative intent must be derived from the words used without involving rules of construction or speculating as to what the legislature intended." *Id* In other words, not only do we not need to resort to legislative history, as the dissent does, to understand this plain meaning; we cannot do so. *See Taylor Woodrow Constr. Corp. v. Burke Co.*, 606 So.2d 1154, 1155 (Fla.1992). ("The court should look to legislative history only if the court determines that a statute's language is ambiguous.").

Id. at 12 [Concurring opinion]

[40] Where a statute does not specifically define words of common usage, a dictionary may be consulted to ascertain the plain and ordinary meaning the Legislature intended to ascribe to the term. See *Barr v. State*, 731 So.2d 126 (Fla. 4th DCA 1999)
State v. Darynani, 774 So.2d 855, (Fla.App. 4 Dist., 2000).

[41] *See* Websters' Ninth New Collegiate Dictionary, 761 (Frederick C. Mish ed. Merriam Webster 1991)

Board Certified Wills, Trusts and Estate Lawyer in the State of Florida, and who exclusively practices in the area of trust and estates), interpreted the statute in this way, and believed the Foundation was void from the outset.

Yet, the Circuit Court disregarded this analysis and ruled that Bealer did not make a mistake with regard to the Farm title. (*see* Order at 11)

While cases dealing with cancellation of irrevocable *inter vivos* trusts on grounds of mistake seem to turn on their own facts,[42] the law in several other jurisdictions has followed the principle that a trust can be rescinded because of a material mistake in its creation.[43] Mistake preventing a voluntary deed or trust from constituting a true expression of the real intention of the grantor has been held to be grounds for setting such deed aside[44] where established by sufficient proof.[45] At least one court has determined that rescission should be allowed for an inducing "mistake of law" where an *inter-vivos* transfer had significantly different tax consequences than anticipated by the transferor.[46] In some instances, misunderstanding or ignorance as to the legal effect of an *inter vivos* trust instrument or agreement may justify the cancellation of the trust.[47]

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[42] *See*, for example, 59 ALR 2d 1229, *Cancellation of Irrevocable inter vivos Trust on Ground of Mistake or Misunderstanding* for a discussion of various cases.

[43] *In re Schulz' Estate*, 180 Pa. Super. 243, 120 A.2d 181 (1956); 76 Am Jur. 2d Trusts § 92 Mistake or Understanding.

[44] *Ewing v. Jones*, 130 Ind 247, 29 NE 1057; *Lambdin v. Dantzebecker*, 169 Md 240, 181 A 353, 102 ALR 277; *Osterhof v. Grand Haven State Bank*, 239 Mich 313, 214 NW 178.

[45] 76 Am. Jur. 2d Trusts § 705

[46] *Stone v. Stone*, 319 Mich. 194, 29 N.W.2d 271 (1947), 174 A.L.R. 1349

[47] *Fitzgerald v. Terry*, 190 Okla. 310, 123 P2d 683 (1942) (holding that where evidence clearly established that aged woman executed gratuitous trust conveyance without reserving right of revocation and without intention to divest herself of ownership and control of her property, but under mistaken belief that it was will and that it would enable trustee to take care of her business and act as guardian for her estate, which belief was shared by trustee, lower court had not erred in canceling and setting aside such trust conveyance at woman's request); *Greene v. Greene*, 56 NY2d 86, 451 NYS2d 46, 436 NE2d 496 (1982) (Based on the special rule applicable to contracts between an attorney and client, allegations by a trust settlor that defendant attorneys took unfair advantage of the attorney-client relationship by purporting to create a trust for her which, in fact, granted them powers greater than they would be entitled to have as

Also, if a mistake as to a relevant fact induces a donor to make a donative transfer that the donor would not otherwise have made, the donative transfer may be set aside by the donor.[48] Here, the mistake was a direct result of the representations made by the Plaintiff's husband to Bealer.

In this case, Bealer's gratuitous *inter vivos* transfer to a Foundation was going to result in significantly different consequences than anticipated by Bealer. Upon learning that Jay Parker was wrong and that there were unanticipated consequences, Bealer cancelled the transaction. The Circuit Court should have held that the entire transaction in transferring the property to the Foundation in the first place is void *ab initio* and the Farm was therefore part of the Bealer Estate.

2. The Court did not consider Florida Law that Provides that a Court Can Modify or Terminate a Trust Based on Circumstances

The Circuit Court erred because it failed to consider that, under Florida law, circumstances that the settlor did not know will permit a Court to terminate a trust if compliance with the terms of the trust would defeat or substantially impair the accomplishment of a material purpose of the trust. Florida Statute § 737.4031 states in relevant part:

> (1) If the purposes of a trust have been fulfilled or have become illegal or impossible to fulfill or, if because of circumstances not known to or anticipated by the settlor, compliance with the terms of the trust would defeat or substantially impair the accomplishment of a material purpose of the trust or, if a material purpose of the trust no longer exists, upon the application of a trustee of the trust or any beneficiary, a court at any time may modify the terms of a trust which is not then revocable to:

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fiduciaries and relieve them of the normal fiduciary liability, and that plaintiff did not understand the terms or effect of the agreement would, if proven, entitle plaintiff to rescission of the agreement unless defendants could convincingly show that plaintiff was fully and fairly informed of the consequences of the agreement and the special advantages it gave to them.)

[48] Restatement Second, Property (Donative Transfers) § 34.7.

(a) Amend or change the terms of the trust, including terms governing distribution of the trust income or principal, or terms governing administration of the trust;

(b) Terminate the trust in whole or in part;[49]

West's F.S.A. § 737.4031 (Portions omitted)[50]

In this case, the circumstances of the application of the five percent minimum distribution rule, based on Jay Parker's advice, would likely "defeat or substantially impair the accomplishment of a material purpose" of the Foundation. Even if the five percent distribution rile is not considered, it is clear that Bealer intended to give the Farm to his granddaughter in his estate plan.

Under the circumstances of this case, the following cannot be reasonably disputed:

- Bealer' intent is clear – he wanted to preserve the Farm, and disposed of the Farm through his estate plan.
- Bealer – thanks to Plaintiff's husband, Attorney Ellis J. Parker – was mistaken regarding the application of the five percent minimum distribution rule to the Hartford Bealer Foundation.
- Returning the Farm to the Foundation will likely result in the sale of the Farm and the frustration of the purpose of the Foundation.
- Affirming the deed transferring the property back out of the Foundation to Bealer will have the best chance to accomplish Bealer's purpose of preserving the Farm.
- The five percent distribution rule notwithstanding, Bealer clearly intended to give the Farm to his granddaughter in his estate plan.

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[49] Paragraph (3) of the same statute states that "In exercising its discretion to order a modification of a trust under this section, the court shall consider the terms and purposes of the trust, the facts and circumstances surrounding the creation of the trust, and extrinsic evidence relevant to the proposed modification."

[50] There may be procedural steps involved in the application of this statute by Florida Courts, under related Florida statutes. Also, subsection 2 of this statute is inapplicable to this Foundation document because it does not apply to trusts created prior to January 1, 2001.

- The Court has the authority under Florida Statute 737.4031 to modify or terminate the Foundation to accomplish Bealer's purpose.

Given the facts of this case, the Circuit Court should have terminated the Foundation and ordered the deed transferring the Farm back out of the Foundation to Bealer to be upheld so that the Farm could have been placed in Bealer's estate plan to be dealt with in the Florida probate proceedings.

3. Bealer never received the tax benefits that are the legal basis for the Foundation

The legal purpose[51] of a Foundation such as the Hartford Bealer Foundation is to make what amounts to a charitable gift (to the Foundation), partly in order to obtain tax benefits for the creator of the Foundation. In this case, the purpose of the Foundation was never consummated because, once Bealer realized his Jay Parker-induced mistake in creating the Foundation, he withdrew the Farm from the Foundation and did not claim any tax benefits arising from the creation of the Foundation.

Since Bealer never received the tax benefits that were the legal purpose of the Foundation, the rationale for the existence of the Foundation never materialized. Bealer withdrew the Farm from the Foundation and did not claim any tax benefits arising from the creation of the Foundation once he realized his mistake in attempting to create the Foundation. The Foundation therefore never really existed as a viable entity.

4. The Foundation was never adequately funded

In her Motion for Summary Judgment before the Circuit Court, Nancy Parker claimed that the Foundation was funded because (1) Bealer had a property insurance

[51] Of course, Bealer's underlying purpose was to preserve the Farm.

policy on the buildings, and (2) Bealer is claimed to have deposited five thousand dollars in a checking account.

The claim that the hazard insurance policy on the buildings somehow "funded" the Foundation is so absurd that it requires no discussion. No money came into the Foundation through that method.

Even if it is true that Bealer opened a checking account, the de minimus amount deposited in the checking account is wholly inadequate to meet even the five percent distribution rule. The five percent minimum distribution rule probably meant that Bealer would have to contribute money into the Foundation estimated at Fifty Thousand annually,[52] not five thousand, or he would likely have had to sell a portion of Farm to meet the five percent minimum distribution rule requirement.

The checking account was apparently opened to cover some Farm expenses, to which Kathleen Stone later testified.[53]

Thus, the Foundation was never properly funded, and the burden on Bealer to meet the legal requirements for a typical Foundation did not mature, under the facts of this case.

5. There was no self dealing here

The Court below erred in concluding that Bealer could not remove the Farm from the Foundation. While the Foundation document does contain language that seems to limit or prohibit Bealer from giving the Farm to anything other than a charitable

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[52] If Bealer had contributed a substantial amount to fund the five percent minimum distribution going forward, that amount would have increased the annual required minimum distribution (e.g., a contribution of $100,000 would mean that in the first year the minimum distribution would have been increased by $5,000 – 5% of $100,000).

[53] *See* Depo. Kathleen Stone (January 6, 2005) 133:18-134:16.

organization, the specific facts of this case negate the entire self dealing concept.

The classic reason for the self dealing rules are to avoid "double dipping" – that is, to avoid someone like Bealer donating property to a Foundation and claiming a tax benefit for the donation, and then taking the property out of the Foundation and keeping the property along with the tax benefits.

Under the specific facts of this case, there was no "double dipping" and consequently, no reason to invoke the self dealing concept, since Bealer never received tax benefits under the auspices of the Foundation.

6. Under Florida law, Bealer Had A Right To Dispose Of His Own Property As He Saw Fit

Bealer could transfer the Farm out of the Foundation when he determined the Foundation did not fulfill the intended purpose.

The Florida Constitution gives "all natural persons" "inalienable rights" which include the right to "acquire, possess, and protect property." [54] In this case, Bealer was merely asserting his constitutional right over his own land – and this Court should not penalize him for it.

Faced with the choice, as Bealer saw it, to save the Farm or sell it to meet the five percent minimum distribution rule, Bealer chose to remove the Farm from the Foundation and forego any income tax benefit that he might have incurred, in order to place the Farm in his estate plan.

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[54] Fl. Const. Art. 1, Sec 2.

B. Even if the Foundation was not Void *ab initio*, the Court below erred in its failure to give effect to Mr. Bealer's intent to revoke the Foundation and give his Farm to his granddaughter Under his Estate plan

1. Bealer's intent was clear

It is crystal clear that Bealer intended to remove the Farm from the foundation and return it to his estate. It is just as clear that his intent was to preserve the Farm, and he wanted it passed through his estate to his granddaughter, Kathleen Stone, whom Bealer believed shared his vision for the Farm.[55]

West Virginia Courts have always tried to discern and follow a testator's or settlor's intent in trust and estate matters. The same is true for Florida courts:

> In construing wills and trusts, the intent of the testator or settlor should prevail and effect given to his wishes. See *Knauer v. Barnett*, 360 So.2d 399 (Fla.1978); *Gilbert v. Gilbert*, 447 So.2d 299 (Fla. 2d DCA 1984). This intention should not be determined by isolated words and phrases but rather the instrument as a whole should be considered and the testator's general plan ascertained.

First Nat. Bank of Florida v. Moffett, 479 So.2d 312, 313 (Fla.App. 5 Dist.,1985)

> The cardinal rule of construction in trusts is to determine the intention of the settlor and give effect to his wishes. *Cartinhour v. Houser*, 66 So.2d 686 (Fla.1953).

Gilbert v. Gilbert, 447 So.2d 299, 301 (Fla.App. 2 Dist.,1984)

> The highest duty of the courts and the most fundamental rule of the testamentary construction, is to give effect to the will of the testator-to ascertain from every provision of the will, read as a part of a general plan, what the testator intended to do-and after this intention has been ascertained-to give effect to it unless some settled principle of law or public policy is violated.

Cartinhour v. Houser, 66 So.2d 686, 687-88 (Fla. 1953)

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[55] *See* Depo. Kathleen Stone (December 3, 2004) 18:10-20, quoted in Paragraph #21 under the Statement of Relevant Facts, above.

> In determining the testator's intent, numerous factors should be considered, including his situation at the time he made his will, his ties to the beneficiaries, his motives, and the influences present.

In re Howard's Estate, 393 So.2d 81, 83 (Fla.App., 1981)

While the Circuit Court states that the cardinal rule in construing a trust is to "give effect to the grantor's intent . . ." (*Order* at 7), the Court wholly fails to apply this rule under the facts of this case. Most important is the Court's failure to recognize that Bealer's removal of the Farm from the Foundation is the best evidence of his intent that we have available – yet the Court ignores the significance of this fact in construing Bealer's intent. The Court instead narrowly focuses on the creation of the Foundation and the foundation document, rather than the entire picture that Bealer intended to not formally continue the Foundation since he removed its asset when he deeded the Farm out, never claimed tax benefits, and never used the Foundation for its intended purpose.

Bealer's intent is also shown in Bealer's formal estate planning documents – which unequivocally leave the Farm to Bealer's granddaughter, Kathleen Stone. (*See* Fourth Amended and Restated Declaration of Trust quoted in the facts above.)

We also have other evidence available to show Bealer's intent – and that removing the Farm from the Foundation to preserve the Farm was his primary goal. Consider the following statements and excerpts from transcripts:

- Deposition of Kathleen K. Stone:
  Testified that Hartford Bealer loved the Farm and his intention was to have the Farm preserved. 18:10-20; 21:7-13; 103:14-17; 103:24-104:1; 200:4-16 ("Whole intent was to preserve the family Farm.")

- Deposition of Jonna S. Brown, Esq.
  Testified that Hartford Bealer did not want the Farm sold, his intention was to have the Farm preserved. 21:6-11("He was talking to us about his West Virginia property because he had indicated to us that he wanted to

preserve this property in the manner in which it was at the time. He didn't want any further development on the property. He wanted it to be preserved in the condition that it was in."); 110:5-112:15 ("He specifically said ,'I don't want the property sold.' "Yes.")

Testified that Hartford Bealer, in November, 2000, was very concerned that Jay Parker was going to sell the Farm property without his knowledge. 167:4-16 ("he was concerned that Jay was going to sell this property without Mr. Bealer knowing anything about the sale and the fact that the property was being sold. He didn't want the property being sold. He was very concerned about it.")

- Deposition of Ronald L. Fick,Esq.
  Testified that Hartford Bealer wanted his Farm to be preserved and not sold. ("we did discuss with Mr. Bealer the preservation of this Farm. Mr. Bealer said he did not want this Farm sold. He wanted it preserved. He wanted it conserved. He wanted it in the form it's now or was then. He didn't want it touched."); 50:6-14;

  Testified that Hartford Bealer was very concerned that Jay Parker was negotiating a sale of the Farm. 126:2-8; ("His concern at the time he removed Mr. Parker was that the Farm might get sold, a portion of it sold."); 159:1-6; 165:14-19; 167:17-20, 168:8-12; 170:2-5

- Deposition of Trent S. Kiziah, Esq.
  Testified that Harford Bealer wanted to preserve the Farm. 142:15-19

- Deposition of Nancy B. Parker
  Testified that Hartford Bealer wanted to preserve the Farm forever and not to be sold. 69:1-10; 70:11-12; 74:3-9 ("he wanted it preserved forever. He didn't want any lots sold off, he didn't want anything like that."); 166:25-167:1 ("he was always talking about preserving the Farm forever and never letting anybody sell it,"); 168:4-6 ("He was speaking to everybody that was at the Farm, told everybody he was going to preserve it forever.")

In this case, unlike many estate cases, we do not have to guess at Bealer's intent – he made his intent abundantly clear by removing the Farm from the Foundation and providing to give the Farm to his granddaughter as part of his estate plan - yet the Court ignores his true intent entirely, while focusing only on the narrow language of the Foundation itself. The Court therefore erred in failing to give effect to Bealer's intent

that was made clear by his action removing the Farm from the Foundation and passing it through his estate.

2. The Foundation was part of Bealer's estate plan and the Court should apply the same standard of review to the Foundation that it would in construing a will

Bealer used the Foundation as a part of his estate plan. Parker is incorrect in asking the Court to see the case as an isolated tax exempt foundation matter, because it was really more of an estate planning or will issue, since Bealer was using the Foundation as a vehicle, not unlike a trust, to further his estate planning goal of preserving the Farm.

The Court should therefore consider these issues under the same standard that it would consider the interpretation of a will – that is, the testator's intent controls. This standard has been too often stated to require further citation.

Unlike a typical will case, the Court does not need to peer through murky waters in an attempt to discern the testator's intent, because Bealer made his intent clear. There is no doubt as to what Bealer intended to do with his property. He wanted to preserve the property for future generations to enjoy. Once Bealer realized his Jay Parker-induced mistake in the concept of the Foundation, he moved to correct the mistake, and clearly demonstrated his intent by removing the Farm from the Foundation when he realized that the Foundation would destroy the Farm instead of save it.

Bealer then amended his estate documents[56] to give the Farm to his

[56] Hartford E. Bealer Fourth Restated and Amended Declaration of Trust, February 21, 2002

granddaughter, because she shared his love of the Farm and his intent to preserve it.[57] Bealer's estate planning documents should control here, because they give the clearest picture of Bealer's intent - to give the Farm to his granddaughter.

The Court can easily discern Bealer's intent from the estate planning documents alone. When those documents are coupled with Bealer's action in removing the Farm from the foundation, the Court is provided with unassailable evidence of Bealer's intent.

Unfortunately, the Court below did not follow Bealer's intent, and erred in failing to do so. It is up to this Court to correct that error.

Nancy Parker did not attempt a legal challenge to change the disposition of the Farm while Bealer was alive. It is only now, after his death, that Parker steps forward, purportedly in the role of a trustee of the Foundation, and tries to undo that which her Father wanted done. The effect of Parker's action is to alter the testamentary disposition of her Father's estate by taking the Farm from Bealer's estate plan and putting it back into the Foundation, which, as stated below, amounts to giving the Farm to the IRS because of the penalties it will incur.

If Parker was a trustee of a testamentary trust and tried to so blatantly thwart the testator's intent, she would be removed.

> "Where the trustee occupies antagonistic relations to the trust property because of his personal interest therein, or where inharmonious or unfriendly relations exist between the trustees, or between them and the *cestui que* trust, there may be sufficient reason for removal...."

Highland v. Empire Nat. Bank of Clarksburg, 114 W.Va. 498, 171 S.E. 551, 554 (1933)

It is no different in this case. Parker is attempting to change the testamentary disposition of Bealer's estate. This Court should therefore view this under the same

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[57] *See* Depo K. Stone, (December 3, 2004) 18:10-20

standards as it would an estate case.

> "In the construction of wills uniform justice is better than strict consistency, because the testator necessarily confides his meaning to an instrument which courts of equity are sacredly enjoined to interpret justly as between him and those he leaves behind, should controversy arise; death having closed his own lips.". . . "[c]ourts are never bound to give a strict and literal interpretation to the words used, and by adhering to the latter, defeat the manifest object and design of the testator."
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> . . . "Where words are used in a will in a context which renders them doubtful or meaningless, they may be substituted by other words, if such substitution will carry into operation the real intention of the testator as expressed in the will, considered as a whole and read in the light of the attending circumstances."
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> . . . " 'Technical words are not necessary in making testamentary disposition of property; any language which clearly indicates the testator's intention to dispose of his property to certain persons, either named or ascertainable, is sufficient.'"

Hedrick v. Mosser, 214 W.Va. 633, 637, 591 S.E.2d 191, 195 (W.Va.,2003). (citations and references omitted)

This Court does not have to look at anything beyond Bealer's actions in taking the Farm out of the Foundation and placing it in his estate documents to discern his intent. The Court should honor his intent and, at a minimum, deny Parker's attempt to change Bealer's estate plan through this case.

C. The Court below had no jurisdiction to alter Bealer's Florida estate plan

The Court also lacked jurisdiction to interfere with the operation of the Florida probate court, where Bealer's will had been drafted, signed, and duly admitted to probate. The Court's decision below had the effect of altering Bealer's testamentary disposition of his Farm by taking the Farm out of his estate plan and putting it back into the Foundation. This Court has held:

> In this state equity has no general jurisdiction, nor jurisdiction given by statute, to set aside a will and the probate thereof, for alleged fraud in the procurement thereof, of one domiciled in another state, duly probated there, and subsequently duly admitted to probate in this state.

Woofter v. Matz, 71 W.Va. 63, 76 S.E. 131, (W.Va. 1912)

While *Woofter* is dealing specifically with fraud in the procurement of a will,[58] the principle remains the same, that is, the Courts of this state are not to interfere with the operation of the probate courts in another state. The Circuit Court erred in the same manner feared by the *Woofter* court, which did not wish to interfere with the probate process of another state, noting that it was improper to:

> [c]onfer jurisdiction on the courts of this state to wholly set aside a will solemnly probated by the judgment of a court of the domicile, and to disturb the due administration of his personal estate according to the law of the place controlling it. We think our statute plainly designed to avoid any such conflict of jurisdiction, and the evil consequences that would flow from it.

Woofter v. Matz, 76 S.E. 131, 133 (W.Va. 1912)

The Court below was without jurisdiction to alter Bealer's Florida estate plan in this manner.

D. The Court's failure to join the West Virginia ancillary administrator deprived the Court of jurisdiction, consequently, the Court's judgment in the necessary party's absence is void

The Bealer estate, although probated in Florida, has an ancillary probate for the estate in West Virginia, as required by W.Va. Code §41-5-13. The ancillary administrator in West Virginia retains technical legal title to the Farm, which is West

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[58] The analogy is actually fairly direct because the case below contains at least one count in the complaint that alleges fraud on the part of Kathleen Stone in obtaining the property by convincing Bealer to remove the Farm from the Foundation and placing it in his estate plan.

> "Prior to and at the time of the alleged making and execution of the Deed of December 11, 2000, the Deceased was wrongfully manipulated and convinced to remove the real estate from the Foundation by Kathleen K. Stone and to allow Kathleen K. Stone to handle most, if not virtually all, of the Deceased's affairs relating to the real estate." *See* ¶55 of the Complaint.

Virginia real estate.

This Court has held that:

> . . . when a court proceeding directly affects or determines the scope of rights or interests in real property, any persons who claim an interest in the real property at issue are indispensable parties to the proceeding. Any order or decree issued in the absence of those parties is null and void.

O'Daniels v. City of Charleston, 200 W.Va. 711, 716, 490 S.E.2d 800, 805 (W.Va.,1997)

The Circuit Court did not join the ancillary administrator as a party, thereby failing to consider that the ancillary administrator, as representative of the estate, has an "interest in the real property at issue" within the meaning of *O'Daniels*. The Court's Order, in the absence of the ancillary administrator, is void, and consequently, the court below lacks jurisdiction to make a decision as to the title of the Farm.[59]

West Virginia law also recognizes the principle that foreign administrators have no authority to act within West Virginia, when ancillary administrators have been appointed to care for the decedent's assets located in this state.

In *Wirgman v. Provident Life & Trust Co.*, 79 W.Va. 562, 92 S.E. 415, 416 (1917) the Court held that:

> "An executor or administrator, duly appointed under the authority and jurisdiction of another state or country, acquires a good title to the personal property and assets of his intestate, which are there found, and

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[59] This Court has held that:

> "[l]ack of jurisdiction of the subject matter may be raised in any appropriate manner ··· and at any time during the pendency of the suit or action." . . . . As to the appropriate manner by which the lack of subject matter jurisdiction is raised, we have said that "[l]ack of jurisdiction may be raised for the first time in this court, when it appears on the face of the bill and proceedings, and it may be taken notice of by this court on its own motion." . . . ("This Court, on its own motion, will take notice of lack of jurisdiction at any time or at any stage of the litigation pending therein."); . . . The urgency of addressing problems regarding subject-matter jurisdiction cannot be understated because any decree made by a court lacking jurisdiction is void. . . ."

State ex rel. TermNet Merchant Services, Inc. v. Jordan, 217 W.Va. 696, 700, 619 S.E.2d 209, 213 (W.Va.,2005) (citations omitted)

> which come to his hands by virtue of such appointment, and he is to be held accountable therefor only in the legal tribunals of the state or country under which he holds his office."

West Virginia courts are in agreement that a foreign administrator or executor has no power or authority in this state. See *Oney v. Ferguson*, 41 W.Va. 568, 23 S.E. 710 (1895); *Crumlish's Adm'r v. Shenandoah Valley Ry. Co.*, 40 W.Va. 627, 22 S.E. 90 (1895); *Leach et al. v. Buckner, Adm'r*, 19 W.Va. 36, 44 (1881).

In *Welsh v. Welsh*, 136 W.Va. 914, 69 S.E.2d 34 (1952) the Court held that a personal representative appointed under the laws of the state of the domicile of the decedent has no extra-territorial authority by virtue of such appointment.

The Court in *Curl v. Ingram*, 121 W.Va. 763, 6 S.E.2d 483, 484 (1939) also held that:

> "This is in conformity with the common law rule that letters of administration have no extra-territorial effect, and, consequently, that a foreign personal representative cannot prosecute a suit in another jurisdiction unless there be legislative authorization therefore. No statute of this state has granted such right."

The Court erred by failing to recognize the appointed ancillary administrator, who alone has the powers incident to the administration of all of the decedent's assets located in the State of West Virginia, and making him a party to this proceeding.

W.Va. Code, § 11-11-17(a) addresses estate taxes and the discharge of nonresident decedent's real property in absence of ancillary administration. The Code states in (a):

> "The domiciliary personal representative of a nonresident decedent may apply to the tax commissioner for a certificate releasing all real property situate in this state included in decedent's gross estate form any lien imposed" ... "In the absence of ancillary administration in this state, the tax commissioner may consider reliable and satisfactory evidence furnished by the personal representative regarding the value of real property and the amount of tax due ..."

It is evident by the wording of this statute that a domiciliary representative lacks authority over a nonresident decedent's estate located in the State of West Virginia, if an ancillary administrator has been appointed to handle the decedent's estate located in this State, as in the present proceeding.

This is further evidence that the Court erred in not naming the ancillary administrator as a party, due primarily to its failing to recognize the authority the ancillary administrator has over the decedent's West Virginia estate, including his holding of title to the property.

West Virginia Code, § 41-5-4, governing the place of probate, provides that if decedent "died out of this State, his will or an authenticated copy thereof, may be admitted to probate in any county in this State, wherein there is property devised or bequeathed thereby." W. Va. Code, § 41-5-4(d).

Neither the West Virginia nor the Florida statute, however, restricts probate jurisdiction to the state of a decedent's domicile. The West Virginia statute does not mention domicile, and the Florida statute states that "if the decedent had no domicile in this state, then [venue is appropriate] in any county where the decedent's property is located."

In its rendering of a decision involving decedent's estate located in both West Virginia and Florida, the Southern District Court of West Virginia held in *Glucksberg v. Polan,* 2002 WL 31828646 (S.D.W.Va.)[60] that:

> "Obviously, both statutes contemplate local probate of an estate when the decedent owns property in the state, even when he is domiciled in another state. These statutes, like those of most states, 'make no distinction

[60] 2002 WL 31828646 (S.D.W.Va. Dec. 16, 2002)

between the probate of wills of persons domiciled [in state] and the probate of wills of persons domiciled [out of state].' Harrison on Wills and Administration § 175(1)."

The *Glucksberg* Court further held regarding West Virginia and Florida's probate statutes that:

" 'As reflected in these statutes, any state in which a decedent leaves personal or real property may appoint personal representatives to administer the property of the estate located within that state. Appointments by different states of different personal representatives of an estate are not inconsistent, because 'nothing is better settled than that letters testamentary or letters of administration have no legal operation out of the state from whose court they issue.' Harrison on Wills and Administration § 200(1)."

Accordingly, assuming the validity of Florida and West Virginia appointments of administrators of Estate of Hartford E. Bealer which are unchallenged, each is qualified only within the state of appointment. The Florida appointment has legal force only within the state of Florida, and the appointment of the ancillary administrator in West Virginia has legal force only within the state of West Virginia.

As the *Glucksberg* Court attests:

"The administration of all of a decedent's property is thus 'accomplished by an administration in the domicile of the decedent known as the principal or domiciliary administration, and by an administration in the state where there are assets known as ancillary administration.' Harrison on Wills and Administration § 200(1)."

The Court further held that:

"The law of the domicile governs matters such as the construction of the will and succession of personal property." .... "Nonetheless, 'the domiciliary and ancillary personal representatives are wholly independent.' Harrison on Wills and Administration § 200(1). 'Each independent sovereign considers itself competent to confer, whenever there is occasion, probate authority, whether by letters testamentary or of administration, which shall operate exclusively and universally within its

> own sovereign jurisdiction, there being property of the deceased person or lawful debts owing within reach of its own mandate and judicial process.' *Id.* at § 191.

The Court concluded:

> "In the words of Justice Story, 'it has become an established doctrine, that an administrator, appointed in one state, cannot, in his official capacity, sue for any debts due to his intestate, in the courts of another state; and that he is not liable to be sued in that capacity, in the courts of the latter, by any creditor, for any debts due there by his intestate. The Supreme Court of Appeals of West Virginia has likewise stated that 'a foreign executor cannot maintain a suit in this state, unless authorized so to do by ... statute.' *Winning v. Silver Hill Oil Co.*, 108 S.E. 593, 595 (W.Va. 1921)

While some states, including Virginia, define person for purposes of their long-arm statute to include "executor, administrator, or other personal representative ... whether or not a citizen or domiciliary ...," West Virginia's long-arm statute, W.Va. Code, § 56-3-33, does not include executor or personal representative in definition of "nonresident."

Accordingly, because West Virginia provides for ancillary administration, including the administration of real property belonging to a nonresident of West Virginia, the Court is obligated to recognize the ancillary administrator of Hartford E. Bealer's estate located in Hampshire County.

This Court should determine that the Circuit Court's Order affecting real property is void in the absence of an ancillary estate administrator's presence as a party to this case, and that the Court lacked jurisdiction to make orders in the absence of the necessary party.

E. The Court below set aside the deed but did not engage in the analysis required under West Virginia law

Further, not only did the Circuit Court interfere with Florida's probate process, the Circuit Court's decision, in effect, set aside the December 11, 2000 deed that removed the property from the Foundation.

The Court did not make any effective analysis under West Virginia law to enable it to set aside a deed, especially in view of the West Virginia cases' complaint alleging undue influence. (See *Proudfoot v. Proudfoot*, 214 W.Va. 841, 591 S.E.2d 767 (2003) stating that a deed would not be set aside for incapacity, undue influence, or fraud except for a clear finding of "one or more of these facts by the evidence") *Id.*

There is no basis in the Court's Order to disregard Bealer's obvious intent to rectify his perceived mistake by nullifying the Foundation through removing the Farm from the Foundation and transferring it to Bealer's estate plan. Bealer has not been found to be suffering from any sort of mental disorder, or undue influence, nor has the Court advanced any other reason to justify setting aside the deed, save the Court's reliance on the words of the Foundation document prohibiting transfer of the property. However, in relying solely on the Foundation's prohibition of property transfer, the court disregarded the issue as to whether the Foundation ever really existed, as Attorney Fick testified, and ignored the question of Bealer's intent.

While the Court's decision regarding the Foundation and estate plan should have been decided under Florida law, (as set forth herein), the Court's decision regarding setting aside the deed to the Farm should have been decided under West Virginia law.

In *Keesecker v. Bird,* 200 W.Va. 667, 679, 490 S.E.2d 754, 766 (1997), this Court held that, "It is a universal principle of law that real property is subject to the law of the

country or state within which it is situated." The Court further held that "All matters concerning the taxation of realty, alienation, and the transfer of realty and the validity, effect, and construction which is accorded agreements intending to convey or otherwise deal with such property are determined by the doctrine of *les loci rei sitae,* that is, the law of the place where the land is located." *Id.* at 766-76, 679-680.

The Court in *In re Briggs' Estate*, 148 W.Va. 294, 134 S.E.2d 737 (1964) also found that validity of a will with respect to personalty governed by the laws of the place of testator's last domicile, and with respect to realty, the laws of the place where the realty is situated; the place where the will was executed is without legal significance.

The Court should hold that the Circuit Court was not justified in setting aside the deed to the Farm, in the absence of any substantive analysis that would justify setting aside a deed.

F. The Court below granted summary judgment in the face of disputed facts, and did not fairly hear the evidence in the case

The Circuit Court ignored several points of facts and evidence to grant summary judgment to the Plaintiff below. In the Appellant's view, these facts are in Appellant's favor, and would not preclude this Court from finding in Appellant's favor, however, even if the Court were to view them in the light most favorable to Nancy Parker, they are at best material disputed facts that should have precluded the Circuit Court from granting summary judgment.

Among these facts is the intent of Hartford Bealer as to whether the Foundation was voided, and evidence of Bealer's mistake in creating the Foundation. These issues revolve around Jay Parker's representations that he could avoid the five percent rule. There are material disputed facts that, on the one hand, Bealer relied on Parker's

representation to him that he could avoid the five percent rule,[61] yet on the other hand, Parker testified that he never spoke to Bealer about the five percent rule.[62] The Court claimed it was following Bealer's intent but ignored the fact that Bealer himself revoked the Foundation (if it even existed) by removing the sole asset (the Farm) from the Foundation. Bealer's intent could not be clearer, yet was ignored by the Court below.

The Court disregarded the testimony of Bealer's Florida attorneys that the Foundation was a nullity, and disregarded the evidence of Bealer's intent that Bealer refused to donate his property to a charitable organization due to costs involved,[63] holding instead that Bealer's intent was to "donate the property to charitable organizations." (*See* Order at 11).

The Court erred when it determined in its order that Bealer "intended to form a trust, that Mr. Bealer actually formed a trust . . . and that the trust existed for a lawful purpose" (*Order* at 7, portion omitted) while ignoring two glaring factual and legal contentions – first, that Bealer's actions in taking the Farm out of the foundation revoked the foundation and second, ignoring the testimony of Bealer's Florida attorneys that the trust was void *ab initio* or never really existed. (*see* the statement of facts, *supra*, citing attorney Fick's testimony that "Under Florida law if the execution of a Trust is procured by a mistake, it's void" and attorney Brown's testimony that "the Foundation document was so inconsistent with Mr. Bealer's purposes, that it was never valid.")

Another material error is the Court's determination that the ". . . Foundation was

[61] *See* Fick Depo. (April 19, 2005) 43:23-25 and Brown Depo. (April 20, 2005) 68:18-25.
[62] *See* Parker Depo. (January 6, 2005) 57:6-12.
[63] *See* affidavits of Nancy Ailes and George Constantz attached as *Exhibits P* and *Q* to Defendants' Memorandum of Law in Opposition to Plantiff's Motion for Summary Judgment filed on May 12, 2006 as contained in the record below.

created to make distributions to charitable organizations." (*Order* at 10) This apparently refers to the Court's belief that Bealer wanted to donate his Farm to a land trust, (*Order* at 4-5) however, it wholly ignores the fact that Bealer did not donate the Farm to a land trust because the land trust requested that Bealer pay them an endowment to accept the Farm to assist in maintaining the property, which offer Bealer refused.[64]

The Court also erred in concluding that "Mr. Bealer knew of the tax consequences, and therefore did not create the Foundation out of mistake . . ." (*Order* at 11) when, the *above* facts show that Bealer thought that Jay Parker had resolved the tax issues, and when Jay Parker did not come through with his promised resolution, Bealer deeded the Farm back out of the Foundation. The Court's ruling that Bealer did not make a mistake is error, based on the facts developed in this case.

The Court further erred in its holding that Bealer wanted to "donate the property to charitable organizations" (*Order* at 11) when the facts and Bealer's actions in removing the Farm from the Foundation show otherwise.

If this Court does not rule in the Estate's favor outright, at a minimum, this Court should hold that material disputed facts precluded the Circuit Court from granting summary judgment at this time.

G. The Court below erred in failing to recognize that returning the Farm to the Foundation will likely result in devastating tax consequences

There may be devastating tax consequences if the Court orders the Farm returned

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[64] *See* affidavits of Nancy Ailes and George Constantz attached as *Exhibits P* and *Q* to Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment filed on May 12, 2006 as contained in the record below.

to the Foundation. IRS regulations[65] require that five percent of the market value of the Foundation's assets be distributed to one or more eligible charitable organizations each year. Since it has been over five years since Bealer removed the Farm from the Foundation, the IRS would likely require that the Foundation bring current the five percent minimum distribution requirement for each intervening year. Thus, the Foundation will need to distribute an amount equal to approximately twenty five percent (25%) of the market value of the real estate to one or more qualified charitable organizations. If the Foundation fails to bring the distributions current, then the IRS most likely will terminate the Foundation.

In addition to bringing the Foundation's distribution requirements current, the failure to make the minimum distribution over the past 5 years will result in a punitive tax against the Foundation. This punitive tax could exceed one hundred percent (100%) of the undistributed amount.[66]

Consequently, the punitive tax combined with the actual make-up distributions could be fifty percent (50%) of the market value of the Farm, resulting in a sale of the Farm and its assets – the very thing Bealer was trying to avoid by the creation of the Foundation in the first place.

In addition to the punitive tax imposed for the failure to make the minimum distributions, the IRS could impose an additional tax based upon the nature of the assets held by the Foundation and the inability of those assets to generate sufficient

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[65] I.R.C. 4942

[66] I.R.C. 4942. The punitive tax applies in two steps: (i) initial taxes of 15% of the undistributed amount are assessed unless the failure to distribute was due to reasonable cause and not to willful neglect; and (ii) if the failure to distribute is not corrected within the specified period, an additional tax of 100% of the undistributed income is imposed. The initial taxes are imposed each year per each failed distribution. In this case the undistributed amount is equal to 5% of the market value of the assets.

income to cover the minimum distribution requirements. A Foundation may not make or retain investments that threaten to jeopardize its ability to carry out its charitable purpose.[67] This punitive tax could be as much as one half of the value of the Farm.

Thus, by returning the Farm to the Foundation, the Foundation will be exposed to punitive taxes and make-up distributions in an amount equal to the value of the Farm. This will result in the forced sale of the Farm. Since there probably will be no assets in the Foundation after the payment of the punitive taxes and make-up distributions, the Foundation will likely be terminated.

H. The Court below erred in failing to consider that there is no contractual obligation for the Farm to remain in the Foundation because no consideration existed for the transfer of the property to the Foundation

It is axiomatic that a contract without consideration fails. The same is true for a trust, or, by way of analogy, for a Foundation:

> The law is clear that where no consideration is received by the trustor for the creation of an inter vivos trust, it can be rescinded or reformed for mistake to the same extent that an outright gift can be rescinded or reformed. . . . As Scott, op. cit., states:
>
> > '[W]here the settlor receives no consideration for the creation of the trust, as is usually the case, a unilateral mistake is ordinarily a sufficient ground for rescission, as it is in the case of an outright gift. It is immaterial that the beneficiaries of the trust did not induce the mistake or know of it or share it. It is immaterial whether the mistake was a mistake of fact or a mistake of law. The mistake may be such as to justify reformation rather than rescission of the trust.' (Pp. 2427-2428.)

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[67] I.R.C. 4944. The punitive tax applies in two steps: (i) initial taxes of 5% of the amount of the jeopardy investment are assessed unless the failure was due to reasonable cause and not to willful neglect, plus another 5% of the Foundation manager who participated in the investment knowingly, willfully, and without reasonable cause; and (ii) if the investment is not removed from jeopardy, an additional tax of 25% of the amount of the jeopardy investment is imposed on the Foundation, plus 5% on any Foundation manager who refuses to agree to the removal from jeopardy. The initial taxes are imposed each year that the Foundation held jeopardizing assets. The taxes on the Managers cannot exceed $5,000 per year.

> Generally speaking, there is a mistake of fact when a person understands the facts to be other than they are. .

Walton v. Bank of California, Nat. Assoc., 218 Cal.App.2d 527, 32 Cal.Rptr. 856, Cal.App. 1963 (citing Restatement Second, Trusts § 333, Comment a.) (citations omitted)

There simply is no contract in this case because there was never any consideration for forming a contract. Consequently, the failure of consideration[68] in this case is sufficient for this Court to rule that there was no effective transfer of the deed to the Foundation, and that Bealer's estate owns the Farm.

V. CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the Circuit Court's grant of Plaintiff Nancy Parker's Motion for Summary Judgment and order the Farm to be placed into Bealer's Estate.

Respectfully submitted,
The Estate of Hartford E. Bealer, et al.
Appellants / Defendants Below, by Counsel.

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[68] Even if consideration existed, and the transfer into the Foundation was valid, it is well settled Florida law that this Court could modify the document to comport with Bealer's intentions:

> Where an agreement has been actually entered into, but the contract, deed, or other instrument, in its written form does not express what was really intended by the parties thereto, equity has jurisdiction to reform the written instrument so as to make it conform to the intention, agreement, and understanding of all the parties. . . . . This principle presumes the existence of valid contract to convey land.

Brown v. Brown, 501 So.2d 24 Fla.App. 5 Dist.,(1986) (internal citations omitted)

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THE ESTATE OF HARTFORD E. BEALER, BY U.S. TRUST COMPANY OF FLORIDA, S.B., As Executor of the Estate of Hartford E. Bealer and U.S. TRUST COMPANY OF FLORIDA, S.B., as Trustee of the Hartford E. Bealer Amended and Restated Declaration of Trust, SALLY KIRCHIRO, Trustee, and KATHLEEN STONE,

Appellants / Defendants Below,

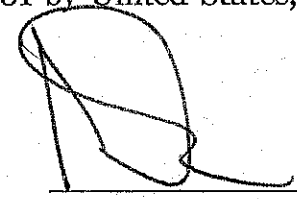
v. **DOCKET NO. 33339**

NANCY B. PARKER, TRUSTEE OF THE HARTFORD E. BEALER FOUNDATION,

Appellee / Plaintiff Below.

CERTIFICATE OF SERVICE

I, Richard G. Gay, Esquire and/or Nathan P. Cochran, Esquire, counsel for Appellants, The Estate of Hartford E. Bealer, et al., do hereby certify that a true copy of the foregoing **APPELLANTS' BRIEF ON APPEAL** and **CERTIFICATE OF SERVICE** was served upon Tammy McWilliams, Esquire, at Trump & Trump, 307 Rock Cliff Drive, Martinsburg, West Virginia 25401 by United States, first-class mail, postage prepaid, this 20 day of April, 2007.



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